No. 95-1581

(3)

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE MONTANA ASSOCIATION OF COUNTIES FOR THE RESERVATION COUNTIES IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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MOTION TO FILE AMICUS CURIAE BRIEF BY MONTANA ASSOCIATION OF COUNTIES (MACO) IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Comes now the Montana Association of Counties (hereinafter MACO) and respectfully moves this Court for leave to file an Amicus Curiae brief in support of Petitioner's Petition for Writ of Certiorari. MACO makes the aforementioned motion pursuant to Rule 37 of United States Supreme Court Rules.

MACO represents all of the Counties of Montana. Montana has seven federally recognized reservations. At least 20 of the 56 counties in Montana either border a reservation or have land lying within a reservation.

Five of the seven reservations were the subject of surplus land acts similar to the 1894 Yankton Sioux Act. Only two of the five Acts have been litigated in the Courts, and one of these two involved an arguably incomplete decision. The remaining three reservations have not faced diminishment litigation. The question of whether diminishment occurred on the remaining three or four reservations is of extreme importance to the counties that either encompass or border the reservations. The question of reservation status affects the extent to which Montana and the impacted counties may exercise civil and criminal jurisdiction. Montana and its counties rely on the precedents established by the Eighth Circuit and this Court in determining their jurisdictional role.

MACO is familiar with issues in Indian law. MACO recently sponsored an Amicus Curiae Brief in the case of *Montana, et al. v. United States Environmental Protection*

Agency, C.A. No. 96-35508 before the Ninth Circuit Court of Appeals. This case directly addresses the issue of tribal jurisdiction over non-Indians and non-members. Because MACO is familiar with the principles of Indian law, it believes that it can provide a fresh outlook and argument to the issues before this Court in the *Yankton Sioux Tribe* case.

Counsel for MACO has contacted counsel for State of South Dakota and Southern Missouri Waste Management District and both have consented to the filing of this brief. A copy of said consent is provided.

Counsel for MACO has contacted counsel for Yankton Sioux Tribe but was unable to obtain their written consent.

Dated this 7th day of May, 1997.

WERNER, EPSTEIN & JOHNSON

THANE P. JOHNSON
Attorney for MACO

QUESTION PRESENTED

WHETHER THE YANKTON SIOUX RESERVATION HAS BEEN DIMINISHED BY VIRTUE OF AN 1894 ACT ADOPTING A "CESSION AND SUM CERTAIN" AGREEMENT BETWEEN THE YANKTON SIOUX TRIBE AND THE UNITED STATES AND BY VIRTUE OF ITS CENTURY LONG TREATMENT AS DIMINISHED?

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INTEREST OF THE AMICI MONTANA ASSOCIATION OF COUNTIES

The Montana Association of Counties (hereinafter MACO) represents all of the Counties in Montana. Montana has 7 federally recognized reservations. At least 20 of the 56 counties in Montana either border a reservation or have land lying within a reservation.

Five of the seven reservations were the subject of surplus land statutes similar to the one at issue in this case. At least 14 counties either encompass or border these reservations. The issue of whether those areas continue as reservations today is of extreme importance to the 14 counties directly affected by the reservations. The question of reservation status affects the extent to which Montana and the 14 political subdivisions may exercise criminal and civil jurisdiction within a reservation. A decision by this Court affecting the reservation boundaries also poses a major impact to the extent the 14 counties can tax.

Montana and the 14 counties impacted by their locality to reservations, rely on the precedents established by the Eighth Circuit Court of Appeals and this Court in determining their future jurisdictional role. A decision by this Court will hopefully link other precedents involving disestablishment and diminishment into a predictable rule for Montana and the 14 counties.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This case encompasses an issue of extreme importance to the Western States of the United States. In the late 1800's and early 1900's, Congress passed several Surplus Land Acts to effectuate the General Allotment Act of 1887. A substantial majority of the Indian reservations in the West felt the impact of the Surplus Land Acts. Many of the States with reservations subject to the Acts, are looking to this decision for guidance.

The Eighth Circuit's decision has left this Court's diminishment decisions in disarray. The Eighth Circuit failed to follow the statutory presumption created by this Court's decision in *Solem v. Bartlett*, 465 U.S. 463, 470-471, 104 S.Ct. 1161, 1166 (1984).

This Court should accept Petitioner's Writ of Certiorari in order to reaffirm the statutory presumption. The Western states and the local governments affected by the Surplus Land Acts require predictability in order to make future decisions regarding construction, services and taxation. The presumption provides this predictability.

The Eighth Circuit's decision ignoring the presumption conflicts with this Court's prior diminishment decisions. Prior decisions containing the cession language and an unconditional commitment to compensate lead this Court to find diminishment. The Yankton Sioux Act of 1894 also contained cession language and an unconditional commitment to compensate the Tribe. The Eighth Circuit erred in failing to follow this Court's decisions.

The Court of Appeals also erred when it failed to give any weight to the jurisdictional history and assumptions of

South Dakota, its local governments and the Yankton Sioux. The State exercised civil and criminal jurisdiction over the entire area of the 1858 Treaty. The Tribe, however, declined "until recently" to exercise any authority over the surplus land. South Dakota and the local governments affected by the Act have invested substantial resources, services and money in the area. The Court of Appeals should have given the State's jurisdictional assumption and expectations substantial weight.

Finally, the Court of Appeals should have considered the future jurisdictional problems when it found no-diminishment. A no-diminishment decision, creates a multitude of issues for courts to decide under the *Montana v. United States*, 450 U.S. 544 (1981) test. These issues make this case one of extreme national importance. This Court should grant Petitioner's Writ of Certiorari.

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI WHEN THE EIGHTH CIRCUIT FAILED TO USE THIS COURT'S PRESUMPTION LEAVING THE QUESTION OF JURISDICTION IN ALL AREAS BORDERING SURPLUS LAND ACT RESERVATIONS IN DISARRAY.

This Court examines the effects of Surplus Land Acts using a three factor test. *Hagen v. Utah*, 510 U.S. 399, 409 (1994). First the Court examines the statutory language of the Surplus Act. Second, the court considers the historical context surrounding the passage of the Act. Finally, the Court pragmatically asks who moved into the opened area. Id.

The most probative evidence of diminishment stems from the statutory language itself. *Hagen v. Utah, supra.*

Congress must clearly state its intent to change boundaries before making a finding of diminishment. *Solem v. Bartlett*, 465 U.S. 463, 470-471 (1984). In *DeCoteau v. District County Court, supra,* this Court began the framework of a presumptive rule interpreting Surplus Acts. In *Solem v. Bartlett, supra,* this Court laid out in plain and simple terms an interpretive rule for all to understand. The *Solem* Court stated:

> Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. *DeCoteau v. District Count Court, supra,* at 444-445; *Seymour v. Superintendent,* 368 U.S. 353, 355 (1962). When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian Tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.

Id.

The Eighth Circuit failed to apply the statutory presumption. Their failure to utilize the rule will lead to uncertainty and unpredictability making this case critical for all states and governmental bodies affected by Surplus Land Acts.

A. The Eighth Circuit erred in failing to apply the statutory presumption.

In 1892 the Yankton Sioux Tribe of Dakota agreed to, "cede, sell, relinquish, and convey to the United States **all their claim, right, title, and interest** in and to all of the unallotted lands within the limits of the reservation . . . ". Art. I. 27 Stat. 1120 (1892).

> In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000.00), as hereinbefore provided for.

Id at Art. II.

The language of Articles I and II fit squarely within the statutory presumption as stated in *Solem v. Bartlett, supra.* The 1892 language plainly states that the Yankton Sioux agreed to cede property to the United States. The 1892 agreement combines the cession language with an absolutely unconditional commitment to pay the Yankton Sioux $600,000.00.

Articles I and II of the agreement left the Court of Appeals with two choices, either declare the presumption of *Solem v. Bartlett, supra,* a misstatement of law, or follow the presumption. The Court of Appeals did neither. The Court of Appeals only mentions the presumption as a part of South Dakota's argument. At best the Court of Appeals simply ignores *Solem v. Bartlett, supra.*

B. Reaffirming the statutory presumption will lead to predictability making this case of extreme national importance.

In the late 1800's Congress set aside large portions of the Western United States for Indian Reservations. *Solem v. Bartlett, supra,* at 466. In 1887, Congress passed the

General Allotment Act. 24 Stat. 388 (1887). The Allotment Act authorized the President to allot the lands of the reservations in severalty to individual Indians and families. Id. "After lands have been allotted to all Indians of any tribe, . . . or sooner if in the opinion of the President it shall be for the best interests of said tribe," the Secretary of the Interior may negotiate with the tribe for the purchase and release of any lands on the tribe's reservation that have not been allotted. Id. at 389. Congress labeled the excess land, "surplus", and envisioned opening the "surplus" to homesteaders. Id. at 390.

Congress intended the Indians to learn to farm, become civilized, and slowly assimilate into society. 17 Cong. Rec. 103, 1633 (1886). Congress hoped the reservations would then cease to exist.[1] Because of the Congressional intent and the pressure of homesteaders seeking new land, Congress passed several surplus land Acts in the late 1800's and early 1900's. See F. Cohen, Handbook

[1] Representative Stevens from the Committee on Indian Affairs, stated, "By these provisions your committee believe the Indian will be stimulated to personal action; the prospect of securing a home that shall be his own will be such an incentive to labor that he will gradually but surely abandon his nomadic habits and settle down to a life of comparative industry. Individual rights, action, and responsibility can only work this change in the condition of the Indian; he must no longer be surrounded by a "Chinese Wall." H.R. Rep. No. 2247, 48th Cong., 2nd Sess. (1895).

Senator Maxey also stated, "He can no longer depend upon this Government to support him in idleness; that the system of herding Indians on reservations to lie idle and be provided for by the Government is to cease." 17 Cong. Rec. 103, 1632 (1886).

Federal Indian Law 127-134 (1982 ed.) The Surplus Acts impacted several Western States.

Five Montana tribes felt the effect of a Surplus Land Act. These Tribes include the Crow, the Blackfeet, the Indians of the Fort Belknap Reservation, the Confederated Salish Kootenai Tribes, and the Indians of the Fort Peck Reservation.

In 1891, the Crow Tribe agreed to dispose of and sell part of its property for the sum of $946,000.00. 26 Stat. 1039-1040 (1891). App. 1. Again in 1904, the Crow Tribe also agreed to "cede, grant, and relinquish," to the United States all of its right, title, and interest in real property for the sum of not less than $4.00 per acre. 33 Stat. 352 (1904). App. 2. This Court stated that these acts "reduced the reservation." *Montana v. United States,* 101 S.Ct. 1245, 1249, 450 U.S. 544, 548 (1981). An unreported District Court decision did, however, find the 1904 Act diminished the Crow reservation. *Hawkins v. Crist,* No. CV 76-99-BLG (D.Mont.January 27, 1978). App. 3. See also *Confederated Salish Kootenai Tribes, Etc. v. Namen,* 665 F.2d 951, 957 n.13 (9th Cir. 1982).[2] Unless the decision in *Montana v. United States, supra,* and *Hawkins v. Crist,*

[2] The 1891 Act contains a similar "savings clause" as the 1894 Yankton Sioux Act. It provides, "That all existing provisions of the treaty of [1868] and the agreement . . . dated [1882] shall continue in full force." The *Montana v. United States, supra,* decision and the *Hawkins v. Crist, supra,* decision did not find that this language denied a finding of diminishment.

supra, equal the litigation of the 1891 Act, then no party has fully litigated the effect of the 1891 Act.

In 1895, the Blackfeet Tribe also agreed to "convey, relinquish and release" to the United States all of its right, title, and interest in real property. 29 Stat. 353 (1896). App. 4. In consideration of the "cession" the United States paid to the Tribe $1,500,000.00. Id.

In 1896 the Indians of the Fort Belknap Reservation also agreed to "convey, relinquish, and release" all their rights in real property. 29 Stat. 350 (1896). App. 5. In consideration for the "cession" the Tribe received $360,000.00. Id. The result of the 1896 Act with regard to the Blackfeet and the Indians of Fort Belknap have never been litigated.

In 1904, Congress "opened to settlement and entry" lands of the Confederated Tribes. 33 Stat. 302 (1904). App. 6. The Act required the money from the sale of the opened land to be given to the local land officer and placed in the United States Treasury. Id. The United States paid the Confederated Tribes in accordance with Section 14 of the Act. Id. The Ninth Circuit held that Congress did not intend to diminish the Flathead Reservation. *Confederated Salish & Kootenai Tribes, Etc. v. Namen*, 665 F.2d 951 (9th Cir. 1982).

In 1908, Congress "opened to settlement and entry" lands of the Indians of the Fort Peck Reservation. 35 Stat. 558 (1908). App. 7. The United States paid the Fort Peck Indians in a manner similar to the Confederated Tribes. Id.

Numerous reservations throughout the United States face similar histories to the Yankton Sioux, and the five Surplus Land Act Tribes of Montana. Many tribes have not experienced the litigation of their Surplus Land Acts. Most states, which encompass these reservations, lie in wait wondering the result of possible diminishment litigation. These states and counties encompassing and surrounding the reservations have invested substantial public funds in developing highways, bridges, and public buildings. Tax dollars pay for services including law enforcement, waste management and road maintenance. The states and counties have made these investments assuming they have civil and criminal jurisdiction over the areas affected by the various Congressional Acts. They also assume they can tax the fee property and the persons in the area.

In reviewing the Congressional Acts affecting the Crow, the Blackfeet, and the Indians of Fort Belknap, all of the Acts contain cession language "buttressed by an unconditional commitment" to compensate for the opened land. Applying the *Solem v. Bartlett, supra*, presumption, the 1891, and 1904 Acts diminished the Crow Reservation and the 1895 Acts diminished the Blackfeet and Fort Belknap Reservations.

Application of the statutory presumption leads to predictability for the states and counties. If this Court reaffirms the statutory presumption of *Solem v. Bartlett, supra*, then the states and counties of the West can rest easy knowing that their investments are subject to their civil and criminal control. The states and counties can make future decisions regarding construction, maintenance, services, and employment. The states and counties

will know that they can tax the fee land in the area and the people in order to fund the construction and services.

C. Failure to use the presumption conflicts with this Court's prior diminishment decisions.

In *Solem v. Bartlett, supra,* at 469 n. 10, this Court compared prior diminishment decisions by creating a spectrum. The *Solem v. Bartlett, supra,* Court placed the *DeCoteau, supra,* decision at the extreme end showing clear diminishment. At the other end of the spectrum the Court placed *Seymour v. Superintendent, supra,* as the clear example showing no-diminishment.

In *DeCoteau, supra,* the Lake Traverse Tribe agreed to "cede, sell, relinquish, and convey" its surplus land for a sum certain of $2.50 per acre. *DeCoteau, supra,* at 437. In *Seymour, supra,* on the other hand, the Act authorized the Secretary of the Interior to "sell or dispose of" the unallotted lands of the Colville Reservation in consideration of any proceeds the sales generated. 34 Stat. 80 (1906). *Solem v. Bartlett, supra,* at 469. The Colville Tribe did not agree to a sum certain, Id.

Finally, the Court found in the middle of the spectrum the Rosebud Sioux Act of 1904. Id. The 1904 Act incorporated the cession language of the Tribe's 1901 agreement but lacked the sum certain language. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 596 (1977). Instead, the Act guaranteed the Tribe only the proceeds from the sale of the surplus lands. Id.

The presumption would apply in *DeCoteau, supra.* The Lake Traverse agreement contained cession language

combined with a commitment to compensate creating a presumption of diminishment.

The Colville agreement, however, contained neither cession language, nor a commitment to compensate. As a result, the presumption cannot apply. The language of the Act, the legislative history and the pragmatic circumstances required a finding that Congress did not intend the Colville Reservation to be diminished.

In the *Rosebud, supra,* decision, the presumption probably applies because Congress provided an unconditional commitment to compensate. Even if the presumption did not apply, the surrounding circumstances and the legislative history caused a finding of diminishment.

In the *Yankton Sioux* case, the presumption applies. The agreement contained express cession language combined with an unconditional commitment to compensate. The *Solem v. Bartlett, supra,* presumption applied.

Despite the statutory presumption found in this Court's precedence, the Court of Appeals did not acknowledge its existence. The Court of Appeals should have required Respondents to rebut the presumption. The Circuit Court should have examined the legislative history and pragmatic circumstances only to see if they rebutted the presumption. Instead, the Court of Appeals ignored the presumption and used the savings clause in Article XVIII to manufacture ambiguity. Finally, the Court of Appeals used inconclusive legislative history and other suspect sources to mold their decision.

II. THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE JURISDICTIONAL ASSUMPTIONS AND FUTURE PROBLEMS AS A PART OF THE SURROUNDING CIRCUMSTANCES.

As stated above, the Courts look to the face of the Surplus Land Act, the legislative history, and the "surrounding circumstances" to determine whether diminishment has occurred. *Rosebud, supra,* at 587, quoting *Mattz v. Arnett,* 412 U.S. 481, 505 (1973). Consideration of the jurisdictional history and assumptions constitutes a part of the subsequent history and surrounding circumstances. See *Rosebud, supra,* at 603. "The element of subsequent history which provides the strongest index of congressional intent is the 'jurisdictional history'." *Hawkins v. Crist, supra,* at App. 3, p. 8.

The jurisdictional assumptions by South Dakota and the Yankton Sioux Tribe strongly support a finding of diminishment. These issues are of extreme importance to the State and the local governments around the 1858 Treaty boundaries.

A. The Court of Appeals erred in failing to give any weight to the jurisdiction assumptions of the State and the Tribe.

As the *Solem v. Bartlett, supra,* Court pointed:

> The Modern legacy of the surplus land Acts has been a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of Indian ownership. As doctrinal matter, the States have

> jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, federal, state, and tribal authorities share jurisdiction over these lands if the relevant surplus land Act did not diminish the existing Indian reservation because the entire opened area is Indian country under 18 U.S.C. Section 1151(a) (1982 ed.).

Solem v. Bartlett, supra, at 467. The "jurisdictional history" of the area and the assumption of jurisdiction by the State are two factors entitled to weight. *Rosebud, supra,* at 604-605. As the *Rosebud, supra,* Court stated, "The long-standing assumption of jurisdiction by the State . . . not only demonstrates the parties' understanding of the meaning of the Act, **but has created justifiable expectations** which should not be upset by so strained a reading of the Acts of Congress." Id.

By making broad assumptions, the Court of Appeals determined that 32 to 44 percent of the population within the 1858 boundaries are Indians. Opinion of the United States Court of Appeals for the Eighth Circuit, at 35 (Oct. 24, 1996). Only 37,000 acres remain in trust within the 1858 Treaty boundaries. Id. at n.25. This equals less than 10 percent of the total 1858 treaty acres. Id.

The Court of Appeals found that South Dakota "has quite consistently exercised various forms of governmental authority over the opened lands." Id. at 32. South Dakota has exercised criminal and civil jurisdiction over the opened areas and has "played a significant regulatory role," over many issues affecting the opened area. Id. The

counties and municipalities patrol the opened areas with county and city law enforcement and maintain over 500 miles of roads within the Treaty boundaries. Id. The Bureau of Indian Affairs maintains only 20 miles of roads in the area. Id.

The Yankton Sioux, on the other hand, has not exercised criminal, civil, or regulatory jurisdiction over non-trust lands, "until recently." Id. at 33. The Tribe also struggles with its exercise of self-government. Id.

The Court of Appeals gave these important jurisdictional assumptions no weight at all. The entire jurisdictional history covers little more than one page in the decision. More importantly, the Court of Appeals attempts to rebut a strong jurisdictional assumption by the State with the weak and inconclusive testimony of one State bureaucrat. The Court also makes very little of the fact that the Tribe itself has not exercised jurisdiction until recently on non-trust property.

The assumption of jurisdiction constitutes the most striking evidence comprising the surrounding evidence of diminishment. The State and local governments took the affirmative step of investing time, resources, and labor into the area. The Tribe, however, failed to invest anything in the area, yet they now claim jurisdiction. If the Tribe believed they had possession to the open lands, they would have attempted to maintain its tribal character using Tribal ideals. If the Tribe believed that the lands were part of the reservation, then they would have regulated the use and environmental quality of the area so as to promote the tribal character. Instead, the Tribe completely and unequivocally left the definition of the land to

the State. Because the Tribe chose to ignore the opened land, the land has developed under the ideals of South Dakota void of any tribal character. Tribal and State officials of the past, therefore, understood the reservation had been diminished.

B. The Court of Appeals should have considered the jurisdictional effect of a finding of no-diminishment.

Tribes reserve the inherent sovereign rights not divested by treaty, an express act of Congress, or by their domestic dependent status. *Montana v. United States, supra,* at 564. See also *United States v. Wheeler,* 435 U.S. 313, 326 (1978). The Tribe's inherent sovereignty generally extends only to what is necessary to protect tribal self-government or to control internal relations. *Montana v. United States, supra,* at 563. This Court has found an implicit divesture of sovereignty in areas involving the relations between tribes and non-members. Id. at 1258, U.S. at 564. The *Montana v. United States, supra,* Court found as a general proposition the inherent sovereign powers of a tribe fail to extend to the activities of non-members. Id. at 565. The Court qualified the general proposition with the following two exceptions:

> [1] To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its

> members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, 358 U.S. 217, 233. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe.

Id. 565.

A finding of no-diminishment opens a pandora's box of jurisdictional issues to clog the federal courts. Although this Court has narrowed the *Montana v. United States, supra,* exceptions,[3] the Federal and State Courts struggle with the issues raised by *Montana v. United States*. A finding of no-diminishment will require the federal and state courts of South Dakota to determine whether the Yankton Sioux can enforce their Tribal Employments Rights Ordinance (TERO) upon non-members on fee land. See *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994). Courts may have to determine whether the Tribe can pass a resolution placing

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[3] A mere ownership of land within the reservation does not constitute consent within the first *Montana v. United States*, exception. *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 427 (1989). Consent requires a finding that the non-member utilizes the services provided by the tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982).

The plurality of Justice White, Scalia, and Kennedy interpreted the second *Montana v. United States, supra,* exception as an authorization to regulate that is dependent upon the finding of "demonstratably serious" circumstances. *Brendale, supra,* at U.S. 430.

a right of first refusal on the sale of fee and trust land. See *Concerned Landowners Assoc., Inc. v. Blackfeet Tribe*, CV-95-124-GF-PGH (Sept. 12, 1996). If the Yankton Sioux make a request under 33 U.S.C. Section 1313 of the Clean Water Act to be treated as a state, the courts will determine whether the Tribe can regulate non-member use of water on fee land. See *State of Montana v. United States*, CV-95-56-M-CCL (Mar. 29, 1996) (appeal before the Ninth Circuit).

A finding of no-diminishment will cause the Court to determine whether the Tribal Court has jurisdiction over a dispute between two non-members. See *Strate v. A-1 Contractors et al.*, U.S.W.L. 202022 (1997) finding that the tribal court did not have jurisdiction. *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), finding the tribal court had jurisdiction. See also *Agri West v. Koyama Farms, Inc.*, 933 P.2d 808 (1997).

A finding of no-diminishment also creates a quagmire of problems for criminal jurisdiction. The State and the Tribe must address the issue of enforcing the criminal laws of conflicting jurisdictions. The questions include what a State trooper does when arresting a Tribal member for driving under the influence, and does the district attorney extradite from the Yankton Reservation.

These issues are of extreme importance to South Dakota and the local governments affected by a no-diminishment decision. The Court of Appeals erred when it did not consider the future jurisdictional problems in light of Tribal regulational void. The Tribe has little or no experience in regulating the fee property within the 1858 boundaries. The Tribe has little or no experience with

effective self-government and no experience in handling effective law enforcement over an area as broad as the 1858 boundaries.

Certainly, the Tribe will face financial constraints in developing a sufficient regulatory body and law enforcement team. Finally, the new territory and its demands will require the Tribe to expand its court including hiring more judges and staff, prosecutors, and constructing new courts. The Court of Appeals should have considered the jurisdictional assumptions, the governmental void, and the practical jurisdictional realities.

CONCLUSION

This Court should issue a writ of certiorari. The Eighth Circuit failed to use the *Solem v. Bartlett, supra,* presumption. Because the Eighth Circuit ignored the presumption, this case stands at the center of all diminishment decisions. Either this Court reaffirms the *Solem v. Bartlett, supra,* presumption and provides predictability, or the Eighth Circuit's decision will stand creating an unforeseeable future for States and local governments throughout the West.

The Eighth Circuit erred in following this Court's diminishment decisions when it gave no weight to the jurisdictional history and assumptions of South Dakota and the Yankton Sioux. South Dakota has consistently exercised civil and criminal authority within the 1858 Treaty boundaries while the Tribe exercised no authority. The Court of Appeals paid no attention to these realities.

Finally, the Eighth Circuit should have considered the jurisdictional problems a no-diminishment decision creates under the *Montana v. United States, supra,* test. A no-diminishment decision opens a quagmire of issues for the courts.

For the reasons stated in this Brief, Amicus respectfully requests this Court to issue Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

SHERMAN P. HAWKINS, Petitioner, -vs- ROGER W. CRIST, Warden of the Montana State Prison, and THE STATE OF MONTANA, Respondents.	)	CV-76-99-BLG MEMORANDUM AND ORDER (Filed Jan. 27, 1970)

Sherman P. Hawkins is currently in the custody of the State of Montana, serving a life sentence for first degree murder. He filed the instant application for a writ of habeas corpus, alleging that the State Court which rendered the judgment against him lacked jurisdiction. Hawkins alleges that the offense occurred in "Indian country,"[1] and was therefore under the exclusive criminal

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[1] Under 18 U.S.C. § 1152, "the general laws of the United States as to punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian country." Under 18 U.S.C. § 1153, homicide committed in Indian country is within the exclusive jurisdiction of the United States. 18 U.S.C. § 1151 defines "Indian country" to mean, *inter alia*, "all land within the limits of any Indian reservation." It therefore follows that if the land on which the offense occurred remained "Indian country", the state courts were without jurisdiction.

jurisdiction of the United States. The offense occurred on a tract of land within the original exterior boundaries of the Crow Reservation, established under the Treaty of May 7, 1868, 15 Stat. 649. Pursuant to an agreement ratified by the Act of April 27, 1904, 33 Stat. 352, the Tribe agreed to "cede, grant and relinquish" its interest in the tract in exchange for certain consideration. The Court concludes that this Act has the effect of disestablishing the tract as "Indian country," thereby rendering it subject to state criminal jurisdiction. The petitioner's application will therefore be denied.[2]

In *United States v. Celestine*, 215 U.S. 278, 285 (1909), the Supreme Court announced the general rule governing questions of disestablishment: "[W]hen Congress has once established a reservation, all tracts included within its remain a part of the reservation until separated therefrom by Congress." The applicability of this rule is demonstrated in four subsequent Supreme Court decisions. *Seymour v. Superintendent*, 368 U.S. 351 (1962), presented basic facts somewhat similar to those in the case at bar. Seymour was convicted in state court of a burglary committed within the original boundaries of the Colville Reservation, on land opened to settlement by the Act of March 22, 1906, 34 stat. 80. He petitioned for a writ of habeas corpus, alleging that the state lacked criminal

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[2] It is uncontested that petitioner has exhausted his State remedies, satisfying the requirements of 28 U.S.C. § 2254(b). This Court, therefore properly has jurisdiction. Neither party has requested an evidentiary hearing, *see* Rule 8, Rules Governing Section 2254 Cases, and I conclude that none is required on this record.

jurisdiction since the offense occurred in "Indian country." The Supreme Court agreed. The Court compared the language of the 1906 Act with that of an 1892 statute which provided that the North Half of the Colville Reservation was "vacated and restored to the public domain." In contrast, the 1906 Act merely "provided for the sale of mineral lands and for the settlement and entry under homestead laws of other surplus lands *remaining on the diminished Colville Reservation* after allotments were first made the patents issued for 80 acres of land to 'each man, woman, and child' " among the tribal members. 368 U.S. at 355 (emphasis added).

The Court found that the language of the 1892 statute explicitly disestablished the North Half of the Reservation. However, the Court concluded that the 1906 "Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id.* at 356. The Court found further support for this interpretation in subsequent legislation referring to "the existing reservation," and in the construction of the 1906 Act followed by the Department of the Interior. The Court concluded that the South Half of the reservation was not disestablished, and that the State was therefore without criminal jurisdiction.

In *Mattz v. Arnett*, 412 U.S. 481 (1973), the petitioner, a Klamath River Indian, intervened in an action seeking forfeiture of certain gill nets confiscated from him within the confines of the original Klamath River Reservation in California. The respondent game warden argued that he was entitled to confiscate the nets since the confiscation

took place in land under state jurisdiction. Petitioner claimed that the area was "Indian country" and therefore under the exclusive jurisdiction of the federal government.

The Court initially examined the history of the reservation, from its creation in 1855 to June 17, 1892, the date of the Act which allegedly disestablished the reservation. The Court concluded that the reservation was clearly in existence prior to the date of the Act. The Court then examined the terms of the Act, which were quite similar to those considered in *Seymour.* It provided "[t]hat all lands embraced in what was Klamath River Reservation . . . are hereby declared to be subject to homestead, entry, and purchase under the laws of the United States granting homestead rights. . . . "[3] The Act further provided that homestead by white settlers would only be allowed as to land not allotted to Indians, and that the "proceeds arising from the sale of said lands shall constitute a fund . . . for the maintenance and education of the Indians. . . . " *Id.* at 495. The Court found this arrangement to be "completely consistent with continued reservation status", citing *Seymour. Id.* at 497.

[3] The fact that the Act referred to the reservation in the past tense was found to be of no moment, in light of the peculiar history of the reservation. Due to legislation limiting the number of reservations in California, the Klamath River reservation had previously been connected to and incorporated in the Hoopa Valley Reservation. The Court found the past tense usage in the Act to be insignificant for disestablishment purposes. 412 U.S. at 498-99.

Prior legislative history was found to support the Court's construction. The 1892 Act was markedly different from prior legislative attempts to explicitly abolish the reservation. Further support was found in the construction placed on the Act by the Department of the Interior and in subsequent Congressional Acts. The Court concluded that the reservation was not disestablished by the 1892 Act.

The Court reached an opposite conclusion in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), a case involving the Lake Traverse Reservation in South Dakota. The case presented the consolidated appeal of two criminal defendants charged in state court with offenses committed on alleged reservation land, and the appeal of an Indian mother contesting state jurisdiction to adjudicate child custody matters on the alleged reservation. The State alleged that its assumption of jurisdiction was proper, based on an 1891 Act which ratified an agreement between the Indians and the Department of the Interior. The Act provided that the reservation land would be allotted in 160 acre tracts to each tribal member, and that the remaining unallotted land would be "ceded" to the United States in exchange for payment to $2.50 per acre. The Act appropriated funds by which to make this payment.

The Court initially noted that a reservation will not be held to be disestablished unless the "congressional determination to terminate [is] expressed on the face of the Act or [is] clear from the surrounding circumstances and legislative history." 420 U.S. at 444, quoting *Mattz,* 412 U.S. at 505. The Court then held that these factors clearly disclosed a Congressional intent to terminate.

The Court found that the Act ratified an agreement whereby for a sum certain in money the Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest" in the unallotted land. The Court contrasted this language with that from *Seymour* and *Mattz*, which merely allowed settlement of unallotted lands. The Court held that in the face of clearly established Congressional intent to disestablish, it could not construe the Act as providing for retention of exclusive federal jurisdiction.

The Court concluded its opinion in *DeCoteau* by distinguishing the case from *Mattz* and *Seymour*. The Court found it significant that this case involved a bilateral agreement whereby the Tribe agreed to relinquish its land in exchange for a sum certain, while *Mattz* and *Seymour* only dealt with a unilateral opening of reserved lands to settlement, with the Indians receiving a fund established by uncertain future sales. The Court concluded that *Mattz* and *Seymour* presented the "guiding principles" for decision of such cases, but that *DeCoteau* provided sufficiently dissimilar facts to justify a contrary result.[4]

The final Supreme Court statement on the point is found in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), which dealt with the effect of statutory enactments of 1904, 1907, and 1910 on the reservation status of a large portion of the Rosebud Sioux Reservation. The acts in question ratified in amended form a 1901 agreement

[4] *DeCoteau* specifically reaffirmed the precedential vitality of *Mattz* and *Seymour*, 420 U.S. at 449. Any suggestion that these cases are no longer good law is therefore clearly wrong; *DeCoteau* and *Rosebud Sioux* merely explain the prior cases.

between the Department of the Interior and the Tribes. The agreement was virtually identical to that considered in *DeCoteau;* it provided for the cession of some 416,000 acres in exchange for a lump sum payment of $1,040,000. In considering ratification, the Congress balked at payment for the land outright. Therefore, in ratifying the agreement, Congress amended the portion dealing with payment to provide (1) that the Indians would only receive consideration for the lands actually sold; and (2) that the United States would not "guarantee to find purchasers but agreed only to 'act as trustee for said Indians to dispose of said lands.' " 430 U.S. at 596.

The Court agreed that in technical usage a "cession" requires bilateral consent. However, the Court did not feel bound by technical usage. The Court found that the intent of Congress, when presented with the original 1901 agreement, was to disestablish the ceded portion. It held the mere change in method of payment to be insufficient to manifest a change in intent.

The Court also noted that other provisions of the Act disclosed an intent to disestablish. For example, the conveyance of land to the United States reserved two sections of each township conveyed "for use of the common schools", which sections were conveyed to the State of South Dakota. The Court found this grant to the State to be consistent with the establishment of State jurisdiction over the ceded land on the same footing as that exercised over any non-reserved land.

It is clear from the foregoing cases that the determination of whether a reservation has been disestablished involves a case-by-case analysis of three factors to

determine the legislative intent:[5] (1) the language used by Congress; (2) the prior and subsequent history of the reservation; and (3) the legislative history. Of these, I think the most critical factor is the language of the statute, which obviously constitutes the clearest barometer of Congressional thinking. In this case, I find that the language strongly indicates disestablishment. The Tribe agreed to "cede, grant, and relinquish to the United States all right, title, and interest" in the tract. This language was found in *DeCoteau* to be "precisely suited" to a purpose of disestablishment.[6] 420 U.S. at 445. Further, the agreement contained clauses identified in *Rosebud Sioux* as being indicative of a Congressional intent to disestablish. The 1904 Act reserved two sections out of each township for state school purposes.[7] Further, Indians holding allotments in the ceded tract were permitted by the 1904 Act to apply for allotments within the "portion

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[5] The Court in *Rosebud Sioux* made clear that the factors identified in these cases are not absolutes. Rather, the Court must balance a number of co-equal factors to arrive at a conclusion on the question of legislative intent. 430 U.S. at 588 n. 4.

[6] In *Russ v. Wilkins*, 410 F.Supp. 579 (N.D. Cal. 1976), the Court collected in table form the operative language of the several cases dealing with disestablishing acts. The cases there collected illustrate the distinction between disestablishment language and language which merely opens a reservation for settlement. *Id.* at 584.

[7] The states of Montana and South Dakota were created by the same enabling act of February 22, 1889, 25 Stat. 679. It therefore appears that the Supreme Court's reasoning regarding the "school sections" provisions in *Rosebud Sioux*, 430 U.S. at 599-601, would apply with equal force here.

of the reservation not ceded, granted or relinquished."[8] Finally, the agreement and the 1906 Act expressly contemplated new boundary lines "for the purpose of segregating the ceded lands from the diminished reservation." This language unmistakably points to a Congressional intent to diminish the amount of land within the reservation boundaries.

Petitioner contends that the legislative history of the 1904 Act is sparse, and that such legislative history as can be found supports the conclusion that the tract was intended to remain Indian land. The items of legislative history cited by respondents flatly contradict this assertion. In fact, the legislative history of the 1904 Act closely parallels that of the 1904 Act in Rosebud Sioux. Both were passed to amend and ratify prior agreements. In both cases the prior agreements provided for an outright sale which would constitute a disestablishment under *DeCoteau*. *See, Rosebud Sioux*, 430 U.S. at 591. In both cases, the original agreements were amended as to method of payment, reflecting Congressional dissatisfaction with the lump sum method of payment. These similarities are not coincidental. Respondents cite the final Senate Report on the Crow Act, which states:

> This bill is almost identical with H.R. 10418, known as the Rosebud Indian bill, which has already passed this house at the present session of Congress.

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[8] *See, Rosebud Sioux* at 613.

It is clear that the enactment of the 1904 Act was a result of the same "familiar forces" which motivated the Congress to disestablish the Rosebud Reservation. *See, Rosebud Sioux*, 430 U.S. at 590. I therefore conclude that here, as in *Rosebud Sioux*, the legislative history supports a finding of disestablishment.[9]

The element of subsequent history which provides the strongest index of congressional intent is the "jurisdictional history." For example, the Court in *Rosebud Sioux* found that the State of South Dakota had exercised "unquestioned . . . jurisdiction over the unallotted lands . . . since the passage of the 1904 Act. . . . " 430 U.S. at 603. The Court concluded from this fact that

> [T]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by

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[9] Petitioner suggests in his opening brief at 11-12 that an alternative reading of the statute would construe it to be a "special allotment", *viz.*, one which divides and allots a reservation with the goal of termination at some future time. He contends that the intended termination of the tract was forestalled by the Indian Reorganization Act of 1934. He cites no language in the Act to support this proposition, and my reading of the Act discloses nothing that even remotely suggests it. Further, petitioner offers no reason why the Court should construe this Act as a "special allotment act" when the Supreme Court in *Rosebud Sioux* held that a virtually identical statute effected a disestablishment of the reservation there in question. *See generally, Rosebud Sioux*, 430 U.S. at 604 n. 27, regarding the effect of the Indian Reorganization Act.

> so strained a reading of the Acts of Congress as petitioner urges.

Id. at 604-5.

In this case, it is unclear whether the State of Montana has consistently exercised its criminal jurisdiction over the tract. However, respondents argue that the Crow Tribe and the federal government have, since 1905, treated the tract as non-reservation land. This is not denied by the petitioner, and the maps and data filed by respondents with their brief tend to support respondents' claim. I find it highly unlikely that the Crow Tribe would relinquish its claim to the tract were it not of the opinion that the tract had been disestablished. Thus, the subsequent history of the tract has not been shown to be inconsistent with a Congressional intent to disestablish.[10]

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[10] Petitioner relies heavily on the Supreme Court's decision in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). In that case, the Supreme Court held that the 1904 Act did not make the tract "public lands" as that term is defined in an act relating to the grazing of livestock. The Court held that the land was held by the United States in trust until sold, and that the trust relationship required the land to be considered "Indian land" rather than "public land" for grazing purposes.

The Supreme court considered the impact of *Ash Sheep* on the disestablishment question in Rosebud Sioux. The Court held the "public land-Indian land" dichotomy of *Ash Sheep* to be substantially irrelevant to the question of disestablishment; stating

> As recognized by the Court of Appeals [in *Rosebud Sioux*, 521 F.2d 87 (8th Cir. 1975)], "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries."

In sum, I find no meaningful distinction between the case at bar and the *Rosebud Sioux* case decided by the Supreme Court. The language and legislative history of the statutes and the subsequent history of the tracts involved are virtually identical. Since petitioner has neither pointed to any meaningful distinctions nor posed any plausible alternative constructions of the Act, I feel bound to decide the case in accordance with the dictates of *Rosebud Sioux*.

In consideration of the foregoing,

IT IS HEREBY ORDERED that the petitioner's application for a writ of habeas corpus be, and the same hereby is, denied.

The Clerk is directed to notify the parties of the entry of this order.

Done and dated this 27th day of January, 1978.

/s/ James F. Battin
United States District Judge

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521 F.2d at 102. The question of whether lands become "public lands" under [*Minnesota v. Hitchcock*, 185 U.S. 373 (1902)] and *Ash Sheep*, is therefore, logically separate from a question of disestablishment.

430 U.S. at 601 n. 24.